No. 14390

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Washington Corporation,

Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEES' BRIEF

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INDEX

TABLE OF CASES

TEXTBOOKS

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APPELLEES' BRIEF

I. STATEMENT OF THE CASE

The appellees agree that the statement of the case as set forth by the appellants is a correct statement of the facts of the case as far as appellants have stated it. But, in addition thereto, the facts show appellants had notice, through their resident manager, that the wire fences were a menace on the project (R. 254). Appellants knew through their maintenance superintendent that fences on the project were destroyed during the day and required daily fence repairs and that it was a dangerous condition that would develop from the disrepair of the fences. It would be dangerous to an individual traveling there (R. 277, 278). The same witness had occasion frequently to repair the fence wire on casual walks through the area, sometimes once a

week and sometimes several times a week, in different areas of the project (R. 278); said fences would be down anytime between 8:00 A.M. and 4:30 P.M.; and said fences would curl across the sidewalks (R. 278). Other employees had similar notice of the fences being down in different parts of the project and such disrepair was so continuous that a constant daily repair program was in effect (R. 212, 230, 241, 261, 262).

On the basis of all the testimony pertaining to the facts adduced at the trial, the court made findings of fact shown in Paragraphs VI and VIII thereof (R. 13, 14) which are amply supported by the evidence and which findings warrant a recovery on the part of the appellees herein.

II. SUMMARY OF ARGUMENT

The appellants had constructive notice of the dangerous condition of the premises brought about by the defective wire barricade erected by appellants.

III. ARGUMENT

We agree with the appellants that in order to impose liability for injury to an invitee upon real property by reason of failure to maintain the premises in a reasonably safe condition, the owner or occupant must have actual or constructive notice of the dangerous condition.

By way of argument concerning the constructive knowledge which the appellants had of the defective condition of the wire barricade and the premises generally which were under their control, attention must be called to the testimony upon which the court made

its findings of fact. To do this it is mandatory to call the court's attention to the testimony of the various witnesses as set forth in the transcript of the record.

The mother of appellee Jean Dooley on several occasions saw the wire down and dangling in the corner of the walk in September and October, 1952, at the point where appellee fell, prior to the day her daughter fell on November 5, 1952 (R. 62, 63).

Yvonne Hart, one week prior to Mrs. Dooley's injury, visited the Dooleys, and she testified that the stakes and wires were laying across the sidewalk at the point where appellee fell (R. 90, 91).

Mrs. Dooley's husband testified the wire wasn't in very good condition prior to November 5, 1952, at the point his wife fell, and that at various times the wire was laying on the sidewalk or a stake was pulled up or knocked over (R. 99). Likewise, he testified to having seen the workers for the appellants straightening wires or putting back stakes (R. 100). He further testified that he did not think the light was adequate to cover the sidewalk where the accident occurred (R. 105). He testified that floodlights could light the sidewalk but would not light the wire (R. 108).

Jean Dooley testified to walking down the middle of the sidewalk at night and at the corner where she fell there was a wire in her path (R. 145). She testified she did not see the wire, and did see a loose wire after she had fallen in the middle of the sidewalk (R. 149).

Nickolas Cvetikovs, night watchman and utility maintenance man, testified that he worked on November 5, 1952, and worked from 6:00 P.M. every night (R.

205); that his duties with respect to the fences which were constructed around the lawn areas were whenever he was around if he saw a fence which was not in order he put the wire aside or fixed it as well as he could; he would just put it in order to "prevent disaster" (R. 208). He testified that whenever he made his round and he found the barricades down he either put them away "on" the sidewalk or just repaired as far as he could with his pair of pliers (R. 212). He testified that on occasions during the fall of 1952 and prior to November 5, 1952, he sometimes set aside barricades that had fallen down or were loose (R. 212). The same witness testified to having picked up wires that had fallen across the sidewalk in the general area where Mrs. Dooley fell a couple of times, maybe more (R. 215).

George Yamada, the maintenance gardener at Lake Burien Heights, employed by Carroll, Hedlund & Associates, Inc., testified that children would at times go out and cut the fences, cut the wires, or swing on the fences and loosen them (R. 234), and he saw barricades down in travelling about the grounds and that it was once or twice a week that he observed that, and that he himself went out and made repairs to the fences (R. 230). He further testified that everyone had a standing order to remove barricades that had fallen onto the sidewalks (R. 233), and that it was customary to place cloth markers hanging from the wire to make the wires more visible (R. 235, 236), and that in attaching cloth ribbons to the barricade wire it made the wires more safe (R. 237).

Oscar F. Hansen, of the landscape gardening firm,

testified that the lawn areas were planted in April, May and June and part of July of 1952 (R. 239) and that his firm put up the barricades around the newly-planted area (R. 240) and that he detailed one or two men to fix the fences and that he usually made the rounds in the afternoon to see if everything was okay for the night (R. 241). He testified that they did use a coarse twine to mark the wires, but the children tore them down and they finally gave up marking them (R. 243). He testified that wires were not down everyday but most of the time (R. 243).

James Brydon, the resident manager of the project, testified that he delegated one man every morning to make the rounds of the project, fixing fences and that the outside working crew worked from 8:00 A.M. to 12:00 noon and from 12:30 P.M. to 4:30 P.M. (R. 253). He testified further that all outside crews had been given orders that anything out of the ordinary seen outside of their immediate work that was wrong was to be reported to the office or to the superintendent; that would mean fences or anything of that kind that was a "menace" to the project (R. 254). He testified to having had quite a few reports of fences being down (R. 261). He testified that complaints had come in at night concerning wires and that it was the sole duty of a man to inspect the wires beginning at 8:00 A.M. in the morning until he could get the job done and that sometimes it took the man an hour or two hours or all day, and that it would take all day sometimes because a lot of wires were down (R. 262).

The maintenance superintendent, Clarence Suder, testified that daily fence repairs were necessitated be-

cause children and adults both destroyed the fences to some extent during the day or during the twenty-four hours of the day (R. 277). He further testified that he had occasion frequently to make repairs to the fence wire, sometimes once a week, sometimes several times a week and that said occasions would be precipitated upon a casual walk through the area which he himself would make, and that would occur anytime between 8:00 A.M. and 4:30 P.M.; and that at anytime he would be walking through the project he was apt to run into a broken down wire fence and that sometimes the wire would be curled across the sidewalk; that they seldom were ever straightened (R. 278). He testified that he frequently made an inspection tour throughout the area after the children went into their apartments or retired and towards evening, and that occasionally he found defects at that hour of the day (R. 279).

Clayton Dykeman, an employee of Lake Burien Heights Housing Project, testified that he was assigned to inspect the entire fencing every day and he started at 8:00 A.M. when he started work; that some days it would take maybe an hour and other days it was somewhere near the whole day (R. 281). He recalled having mended the wire at the point where appellee fell (R. 285), and that he repaired it everyday when it was down when he went around that area (R. 286). He testified that he had originally tied twine to the wire to act as a warning when he first performed his duties and that he thought it was very necessary until they got adjusted to the fence. He further testified he didn't believe the tenants had become entirely adjusted to the fences up until the time he left the project (R. 287). He testified

he left the project on November 15, 1952 (R. 281). He further testified there were times that the wires were drawn across the sidewalk (R. 287).

Marion S. Wilson, the office manager for the project, testified to occasionally receiving complaints from the tenants with respect to the wires being down and to having observed the fences down on one or two occasions (R. 293).

From the foregoing testimony it would seem quite clear that the appellants had actual knowledge that generally the wires throughout the project were down on many, many occasions and that they were a menace and a danger to the tenants and appellants would certainly be chargeable with constructive notice that the wires were apt to be down at any time, day or night, and be a danger to users of the walks.

On the basis of this testimony, is it any wonder that Judge Bowen in his decision and in the findings of fact found that the appellants were negligent in their failure to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk where appellants knew, or in the exercise of reasonable care, should have known that the tenants of said apartments walked and in the darkness would be subject to danger; that they were negligent in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartment would be in the habit of walking, after having knowledge, or in the exercise of reasonable care, should have had knowledge that said dangerous obstruction existed upon said sidewalk?

Is it any wonder that he also found that the sidewalk was under the supervision of the appellants and that the appellee, Jean Dooley, tripped over a wire which was disarranged from a wire barricade which had been erected by appellants to keep pedestrians from walking on the newly-planted lawns and which wire had become broken down in places and had curled up and was permitted by appellants to obstruct the sidewalk in a place in which appellants knew that appellee would customarily and necessarily walk; that as a result of appellants' negligence in maintaining the wire barricade, the plaintiff tripped and fell over said wire and fell violently to the ground?

The law is quite clear and counsel for appellants have cited throughout their brief the law which is generally controlling. These principles are broadly stated in 32 Am. Jur., Landlord and Tenant, Sec. 688, pp. 561-563:

> "It is generally held that where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof, such as entrances, halls, stairways, porches, walks, etc., for the common use of different tenants, it is his duty to exercise reasonable care to keep safe such parts of which he so reserves control, and if he is negligent in this regard, and a personal injury results by reason thereof to a tenant or to a person there in the right of the tenant, he is liable, provided the injury occurs while such part of the premises is being used in the manner intended * * *."

and, Sec. 694, p. 571:

> "Actual or constructive knowledge on the part of the landlord of the defect causing the injury is necessary to render the landlord liable. It is gener-

ally held that to recover for injury received from the defective condition, the burden is on the tenant injured to show that the landlord knew of the defect or by the exercise of reasonable care would have known of it. The negligence of a landlord in regard to the safety of the approaches to the leased premises, and the halls and stairways therein, used by different tenants, is based upon his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge, actual or constructive, of defects therein. It must be shown either that the landlord had knowledge of the defect or that it had been in an unsafe condition for such a length of time that the landlord should have known of it. The question as to the length of time a defect must exist in order that the owner may be charged with notice or knowledge thereof depends very largely upon the nature of the defect and the facts of the particular case * * *."

We submit that the landlord in the instant case, by its agents, knew of the "menace" created by the defective wiring in the barricades and knew that "disaster" might result to the users of the walk. Appellants knew for months of the dangerous condition of the premises and exercised a maintenance program which they felt was sufficient to protect themselves from liability, acknowledging, however, that the condition was not controlled during the darkness; and it also must be acknowledged that the condition was more dangerous in the darkness of night time than in the day time. Yet their program for inspection was not in effect in the night time. When they knew that every morning fences would be found down, it would appear that they should

have taken some precaution to have erected a barricade that was not so faulty and that would not cause injury to others, which they knew the wire barricade would do.

The expense of a wooden fencing would certainly be far less than the wages paid daily to an inspector to repair the fence which they used as a barricade. It would be far more inexpensive to erect a suitable barricade which would cause no one any damage or injury and would be suitable for the purposes intended, namely—to protect the lawns and not cause damage to users of the sidewalks. A barricade of 2x2's placed on 2x2 stakes surrounding the lawn areas would be almost as inexpensive to erect as the wire barricades and certainly the children would not have been able to cut those and break them down as the landlord claims they did with the wire barricades. It would just seem reasonable to require appellants to erect a suitable, safe barricade, than to have the appellants erect an unsuitable, dangerous barricade as they did—a barricade which was much more expensive to maintain than it would have cost to erect a safe barricade in the original instance.

Counsel for appellants are attempting to excuse appellants for negligence in the erection and maintenance of the faulty barricades on the basis that, at the particular time and at the particular place on the sidewalk where appellee fell, they did not have actual knowledge of the barricade being down. This contention, of course, ignores completely the constructive knowledge that they should have had, in the exercise of any reasonable care under the circumstances, that the barricade in that particular place was apt to have been down and on in-

spection would have been found down at the time in question. They also erected the barricade in the first place and knew from experience that it was so faultily built as to constitute a menace to tenants.

If they did not actually know, the point is that they should have known that this wire would be down from the experience they had in this section of the grounds and in other sections of the grounds, and we contend that their past experiences constituted constructive notice to them of the defect.

The whole argument of the appellants in this case is that because they did not have actual knowledge they cannot be held responsible for the damage created. This overlooks entirely all of the law which is to the effect that they are liable for damages if they had *constructive* knowledge of defects. We submit that in this case, by their own testimony and evidence, the appellants show that they had constructive knowledge of the defects and knew of the dangers and that the defects were apt to cause damage to users of the sidewalks.

We agree with the statements of law advanced by appellants in their argument with reference to the obligations herein of the appellants toward appellee. Basically the principles are found in the decision of *Anderson v. Reeder,* 42 Wn.(2d) 45, 48, 253 P.(2d) 423, quoted in appellants' brief:

> "Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants, it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has con-

trol. Tenants who use such portions reserved for common use are invitees of the landlord. In order to render him liable to a tenant injured while using such portions, however, it must appear that there was reasonable cause to apprehend such injury. 32 Am. Jur. 561, Landlord and Tenant, Sec. 688."

and to the same effect is the rule stated in *Andrews v. McCutcheon,* 17 Wn.(2d) 340, 345-346, 135 P.(2d) 459:

" * * * When the landlord either expressly or impliedly reserves control over the stairway, whether there be one tenant or several, the tenant or tenants will be protected in his or their right to the use of the stairway, and the landlord has the legal duty to keep and maintain the stairway in a reasonably good and safe condition for use by such tenants and their invitees.

"The foregoing rules of law are announced and discussed in the following cases: *Lindbloom v. Berkman,* 43 Wash. 356, 86 Pac. 567; *Konick v. Champneys,* 108 Wash. 35, 183 Pac. 75, 6 A.L.R. 459; *Johnson v. Smith,* 114 Wash. 311, 194 Pac. 997; *McGinnis v. Keylon,* 135 Wash. 588, 238 Pac. 631; *Leuch v. Dessert,* 137 Wash. 293, 242 Pac. 14; *Holm v. Investment & Securities Co.,* 195 Wash. 52, 79 P.(2d) 708; *Brandt v. Rakauskas,* 112 Conn. 69, 151 Atl. 315; *Starr v. Sperry,* 184 Iowa 540, 167 N.W. 531; *Roman v. King,* 289 Mo. 641, 233 S.W. 161, 25 A.L.R. 1263, note p. 1273; and note 58 A.L.R. 1412. 4 Thompson on Real Property (Perm. ed.), pp. 88, 94, Secs. 1594, 1596. Restatement of the Law of Torts, p. 980, Sec. 361. 32 Am. Jur., Landlord and Tenant, p. 165, Sec. 170, p. 564, Sec. 689, p. 567. Sec. 691."

Likewise, in *Leuch v. Dessert,* 137 Wash. 293, 295, 242

Pac. 14, the court followed the rule announced in *Seattle v. Puget Sound Improvement Co.,* 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L.R.A.(N.S.) 949, which was a case where the owner of a building had a trapdoor over an areaway in the sidewalk used exclusively for the benefit of the building. The building itself had been leased to various tenants. There was nothing in their tenancy that gave them control of this areaway. The court held that the maintenance and actual possession of that part of the building was in the owner at all times and the court held that he was the one who was responsible for injury resulting to a pedestrian who had been injured by stumbling over the trapdoor. At page 296, the court stated:

> "Situations similar to that in the instant case have been considered many times, and the rule we find to be as we have already announced it. Some of these authorities so holding are: *O'Connor v. Andrews,* 81 Tex. 28, 16 S.W. 628; *Shipley v. Fifty Associates,* 101 Mass. 251, 3 Am. Rep. 346; *Yorra v. Lynch,* 226 Mass. 153, 115 N.E. 238; *Gilland v. Maynes,* 216 Mass. 581, 104 N.E. 555; *Trustees of Village of Canandaigua v. Foster,* 156 N.Y. 354, 50 N.E. 971, 66 Am. St. 575, 41 L.R.A. 554; *Jennings v. Van Schaick,* 108 N.Y. 530, 15 N.E. 424, 2 Am. St. 459; *Siggins v. McGill,* 72 N.J.L. 263, 62 Atl. 411, 111 Am.St. 666, 3 L.R.A.(N.S.) 316; *Branigan v. Lederer Realty Corp.,* 101 Atl.(R.I.) 122; *Perry v. Levy,* 87 N.J.L. 670, 94 Atl. 569; *Payne v. Irvin,* 144 Ill. 482, 33 N.E. 756; *Looney v. McLean,* 129 Mass. 33; *Bissell v. Lloyd,* 100 Ill. 214; *Security Sav. & Comm. Bank v. Sullivan,* 261 Fed. 461; *Wardman v. Hanlon,* 280 Fed. 988; *Frank v. Simon,* 109 App. Div. 38, 95 N.Y.Supp. 666; *Tauber*

v. Rochelsky, 90 Misc. Rep. 382, 153 N.Y.Supp. 199; *Fleischer v. Dworsky,* 90 Misc. Rep. 628, 153 N.Y.Supp. 951; *Gude & Co. v. Farley,* 28 Misc. Rep. 184, 58 N.Y.Supp. 1036; *MacNair v. Ames,* 29 R.I. 45, 68 Atl. 950; *Brown Co. v. O'Connor,* 151 S.W. (Tex. Civ. App.) 339."

In the instant case we certainly believe the appellants had reasonable cause to apprehend the injury that occurred to appellee, and had constructive knowledge, if not actual knowledge, of the defect in their barricades. We believe the appellants were negligent to the extreme in maintaining and continuing a known, dangerous defective barricade system.

In attempting to answer the brief of appellants herein, it is quite clear that the divergence of opinion in the case is brought on by the appellants complete lack of understanding of the meaning of constructive knowledge. The term, in itself, indicates it would not be actual knowledge but is a knowledge which should be learned by the party through their known experiences. Cases cited by appellant are all good law but are not applicable to the situation of the instant case. The cases dealing with invitees of department stores and other commercial establishments are all predicated on their particular facts and go off on the principle that no proof was adduced concerning the knowledge of the landlord or store owner of the defect. It is quite true that grease spots and obstructions on floors of department stores may not have come to the attention of the landlord; but in our case, for months the appellants knew of the defects and the dangers and installed a faulty system of maintenance to try and correct the

dangerous condition. Their attempt to do so, we see, was unsuccessful, as injury resulted to appellee from said defects.

IV. CONCLUSION

We respectfully submit that the decision of the District Judge, entering judgment in favor of the appellees in this cause, should be affirmed.

Respectfully submitted,

R. P. GUIMONT,
Attorney for Appellees.